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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 MICHAEL DAVID WILSON,  
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13  
14 vs.  
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16 FRANK X. CHAVEZ, Warden,  
17  
18 Respondent.  
19

CASE NO. 11-CV-599 - IEG (BLM)

**ORDER:**

**(1) ADOPTING IN PART REPORT  
AND RECOMMENDATION;**

[Doc. No. 15]

**(2) DENYING PETITION FOR  
HABEAS CORPUS; AND**

[Doc. No. 1]

**(3) DENYING CERTIFICATE OF  
APPEALABILITY**

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21 Currently before the Court is Michael David Wilson (“Petitioner”)’s Petition for Writ of  
22 Habeas Corpus pursuant to 28 U.S.C. § 2254 (“the Petition”). [Doc. No. 1.] Petitioner was  
23 convicted, pursuant to a guilty plea that was negotiated by counsel appointed to replace his  
24 original counsel, of vehicle theft and evading a police officer with reckless driving. [Id. at 2.]  
25 Petitioner was sentenced to nine years and four months in state prison. [Id. at 1.] Petitioner’s sole  
26 claim in the Petition alleges a violation of his Sixth Amendment right to the effective assistance of  
27 counsel. [Id. at 6.] Petitioner alleges that he was offered a six-year plea deal at his first court  
28 appearance and informed his original counsel he wished to immediately accept the offer, but his  
counsel failed to communicate Petitioner’s acceptance to the prosecutor, which caused the offer to

1 expire and resulted in Petitioner being sentenced to an additional three years and four months in  
2 prison. [Id.]

3 Respondent filed an answer to the Petition along with a memorandum of points and  
4 authorities. [Doc. Nos. 8-9.] In the answer, Respondent argues that federal habeas relief is  
5 unavailable to Petitioner because the entry of Petitioner's later negotiated guilty plea precludes any  
6 attack on matters occurring before the entry of that plea, including any events surrounding the  
7 earlier six-year plea offer. [Doc. No. 8 at 5.] Petitioner was granted leave to file a traverse on or  
8 before July 22, 2011, but failed to do so by that date.

9 The Court referred the matter to Magistrate Judge Barbara L. Major, who issued a Report  
10 and Recommendation ("R & R") concluding that habeas relief was not available to Petitioner  
11 because: (1) the state court's adjudication of Petitioner's claim did not involve an unreasonable  
12 application of clearly established federal law which precludes an attack on a conviction entered as  
13 a result of a guilty plea unless (aside from exceptions which do not apply here) the plea was not  
14 voluntary and intelligent; (2) even if Petitioner could make such a showing, he had waived any  
15 constitutional claim arising from the original plea deal by entering into the subsequent negotiated  
16 plea; and (3) Petitioner had already received any relief to which he might be entitled because  
17 counsel had been appointed in state court to assist him in enforcing the original six-year offer.  
18 [Doc. No. 15.]

19 On September 26, 2011, Petitioner filed a motion for leave to file his untimely traverse,  
20 [Doc. No. 12], which the Court granted and remanded the issue back to the Magistrate Judge for  
21 the issuance of an Amended Report and Recommendation ("Amended R & R") in light of the  
22 traverse. [Doc. No. 13.] The Magistrate Judge issued an Amended R & R concluding again that  
23 habeas relief was not available to Petitioner and also concluding: (1) that Petitioner had attempted  
24 to raise a new claim in his traverse which is untimely, unexhausted or procedurally defaulted, and  
25 the Court should exercise its discretion to decline to address the new claim; and (2) that an  
26 evidentiary hearing is not warranted. [Doc. No. 15.] The Magistrate Judge recommended that the  
27 Petition be denied. [Id.] The time for filing objections to the Amended R & R passed on  
28 November 14, 2011 without Petitioner filing any objections.

After Petitioner failed to object to the Amended R & R the Court issued an order adopting in full the Amended R & R and denying the Petition. [Doc. No. 16.] Shortly after, Petitioner filed a motion for an extension of time to file his objections to the Amended R & R. [Doc. No. 19.] Accordingly, the Court vacated its prior order adopting the Amended R & R and denying the petition, and the Court granted Petitioner's motion for an extension. [Doc. No. 20.] Petitioner filed his objections on February 6, 2012. [Doc. No. 22.] Petitioner objects to the Amended R & R on the four following grounds: (1) the Magistrate Judge erred in concluding that Tollett v. Henderson, 411 U.S. 258 (1973) precludes habeas corpus relief based upon Petitioner's plea of guilty; (2) the Magistrate Judge erred by finding that it could not hold an evidentiary hearings; (3) the Magistrate Judge erred by finding that his counsel's assistance was effective; and (4) the Magistrate Judge erred by determining that habeas relief was barred by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). [Id. at 1.]

Upon *de novo* review, the Court concludes that Petitioner is not entitled to habeas relief on his Sixth Amendment ineffective assistance of counsel claim. Accordingly, the Court **ADOPTS IN PART** the Amended R & R and **DENIES** the Petition.

### **BACKGROUND**

The Amended R & R contains a complete and accurate summary of the proceedings in this case, and the Court fully adopts the Magistrate Judge's detailed background. [See Doc. No. 15 at 3-6.] In sum, Petitioner alleges that he was offered a six-year plea deal at his first court appearance and informed his original counsel he wished to immediately accept the offer, but his counsel failed to communicate Petitioner's acceptance to the prosecutor. [Doc. No. 1 at 6.] On May 13, 2008, Petitioner, represented by his original counsel, entered an unconditional guilty plea as to all seven counts in the information and admitted to two prior conviction allegations. [Doc. No. 15 at 3.]

On July 30, 2008, prior to sentencing, Petitioner brought a motion to substitute counsel. [Id. at 4.] New counsel was appointed for the purpose of bringing a motion to withdraw the guilty plea. [Id.] Petitioner filed a motion to withdraw the plea on October 1, 2008, which included a motion to enforce a six-year plea deal that was allegedly offered on the first court date. [Id.] On

1 March 12, 2009, before the motion was heard, the parties reached a negotiated settlement in which  
 2 Petitioner was allowed to withdraw his guilty plea to counts one and four, and withdraw his  
 3 admission to one of the prior strike allegations. [Id.] Petitioner then withdrew his motion to  
 4 enforce the six-year plea deal, and was immediately sentenced to nine years and eight months in  
 5 state prison. [Id.]

## 6 DISCUSSION

### 7 **I. Legal Standards**

8 The Amended R & R sets forth the correct legal standards for reviewing federal habeas  
 9 petitions. A federal court may grant a petition pursuant to Section 2254 only if the state court's  
 10 adjudication of petitioner's claims was "contrary to, or involved an unreasonable application of,  
 11 clearly established Federal law, as determined by the Supreme Court of the United States," or  
 12 "was based on an unreasonable determination of the facts in light of the evidence presented in the  
 13 State court proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 403, 412-13  
 14 (2000).

15 A state court's decision is "contrary to" clearly established federal law if the state court  
 16 "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or  
 17 "decides a case differently than [the Supreme Court] has on a set of materially indistinguishable  
 18 facts." Williams, 529 U.S. at 413. On the other hand, a state court's decision is an "unreasonable  
 19 application" if the state court "identifies the correct governing legal principle from [the Supreme  
 20 Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id.  
 21 The state court's decision has to be more than erroneous or incorrect; rather, the application of  
 22 federal law must be "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003)  
 23 (citations omitted).

24 "[C]learly established" federal law, as determined by the Supreme Court of the United  
 25 States, "'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of  
 26 the time of the relevant state-court decision.'" Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting  
 27 Williams, 529 U.S. at 412). However, Section 2254(d) "does not 'require state and federal courts  
 28 to wait for some nearly identical factual pattern before a legal rule must be applied.'" Panetti v.

1 Quarterman, 551 U.S. 930, 953 (2007) (quoting Musladin, 549 U.S. at 81 (Kennedy, J., concurring  
 2 in judgment)). Thus, habeas relief may be appropriate under the “unreasonable application” prong  
 3 when a state court violates the legal principle established by a Supreme Court decision, as long as  
 4 that legal principle is applicable to petitioner’s claims without “tailoring or modification” of the  
 5 standard. Moses v. Payne, 555 F.3d 742, 753-54 (9th Cir. 2009). Moreover, Ninth Circuit case  
 6 law may be “persuasive authority for purposes of determining whether a particular state court  
 7 decision is an ‘unreasonable application’ of Supreme Court law, and also may help [the Court]  
 8 determine what law is ‘clearly established.’” Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir.  
 9 2000) (citations omitted).

## 10 **II. Petitioner’s Sixth Amendment Claim**

11 The Amended R & R concluded that Petitioner was not entitled to habeas relief on his  
 12 Sixth Amendment ineffective assistance of counsel claim. [Doc. No. 15 at 8-10, 14-23.]  
 13 Petitioner argues that the Magistrate Judge erred in concluding that Tollett v. Henderson, 411 U.S.  
 14 258 (1973), precludes his claim for habeas relief based on Petitioner’s plea of guilty. [Doc. No. 22  
 15 at 1-2.] Although the Court agrees that the Magistrate Judge erred in concluding that Petitioner’s  
 16 Sixth Amendment claim was barred by Tollett, the Magistrate Judge correctly concluded that  
 17 Petitioner was not entitled to habeas relief on this claim because the state court’s conclusion that  
 18 Petitioner failed to establish that he was prejudiced by his counsel’s allegedly deficient  
 19 performance did not involve an objectively unreasonable application of law.

### 20 **A. Clearly Established Federal Law**

21 For ineffective assistance of counsel to provide a basis for federal habeas relief, Petitioner  
 22 must satisfy the two-part test from Strickland v. Washington, 466 U.S. 668, 687 (1984). First,  
 23 Petitioner must show that his counsel’s performance was deficient. Id. Second, Petitioner must  
 24 show that counsel’s deficient performance prejudiced the defense. Id. To satisfy the prejudice  
 25 prong, Petitioner need only demonstrate a reasonable probability that the result of the proceeding  
 26 would have been different absent the error. Williams, 529 U.S. at 406; Strickland, 466 U.S. at  
 27 694. A reasonable probability in this context is “a probability sufficient to undermine confidence  
 28 in the outcome.” Strickland, 466 U.S. at 694. Petitioner must establish both deficient performance

1 and prejudice in order to establish ineffective assistance of counsel. Id. at 687.

2 “Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 130 S. Ct.  
3 1473, 1485 (2010). In the context of federal habeas review, “[t]he standards created by Strickland  
4 and section 2254(d) are both ‘highly deferential.’” Harrington v. Richter, 131 S. Ct. 770, 788  
5 (2011).

6 The Supreme Court has held that a defendant is entitled to the effective assistance of  
7 counsel when entering a guilty plea. See Hill v. Lockhart, 474 U.S. 52, 56-57 (1985) (holding that  
8 the two-part Strickland test “applies to guilty pleas based on ineffective assistance of counsel”).  
9 However, the Supreme Court has limited attacks on a conviction as a result of a guilty plea to  
10 challenges to the voluntary and intelligent nature of the plea. In Tollett, the Supreme Court  
11 explained:

12 [A] guilty plea represents a break in the chain of events which has preceded it in the  
13 criminal process. When a criminal defendant has solemnly admitted in open court  
14 that he is in fact guilty of the offense with which he is charged, he may not  
15 thereafter raise independent claims relating to the deprivation of constitutional  
16 rights that occurred prior to the entry of the guilty plea. He may only attack the  
17 voluntary and intelligent character of the guilty plea[.]

18 Tollett, 411 U.S. at 267; see also Hill v. Lockhart, 474 U.S. 52, 56-57 (1985) (“Where . . . a  
19 defendant is represented by counsel during the plea process and enters his plea upon the advice of  
20 counsel, the voluntariness of the plea depends on whether counsel’s advice was within the range of  
21 competence demanded of attorneys in criminal cases. . . . [A] defendant who pleads guilty upon  
22 the advice of counsel ‘may only attack the voluntary and intelligent character of the guilty plea by  
23 showing that the advice he received from counsel was [ineffective].’” (quoting Tollett, 411 U.S. at  
24 267) (internal quotation marks and citation omitted)).

## 25 **B. Analysis**

26 Petitioner contends that his original counsel was ineffective because he failed to  
27 communicate Petitioner’s acceptance of the original plea offer of six years. [Doc. No. 1 at 6.]  
28 After this allegedly occurred, Petitioner was appointed new counsel, filed a motion to withdraw his  
original guilty plea and a motion to enforce the six-year plea deal, and later entered into a new  
negotiated plea and withdrew the original plea and his motion to enforce the six-year plea deal.  
[Lodgement No. 1 at 21-24, 30-35; Lodgement No. 4.] The Magistrate Judge concluded that such

1 a challenge is barred by the rule announced in Tollett because by entering into the later negotiated  
2 plea, Petitioner can only challenge the voluntary and intelligent nature of that plea, and not the  
3 previous plea that was withdrawn. [Doc. No. 15 at 16-17.]

4 After the Magistrate Judge issued the Amended R & R, the United States Supreme Court  
5 issued its opinion in Missouri v. Frye, 2012 U.S. LEXIS 2321 (Mar. 21, 2012). In Frye, the  
6 Supreme Court held that “as a general rule, defense counsel has the duty to communicate formal  
7 offers from the prosecution to accept a plea on terms and conditions that may be favorable to the  
8 accused.” Id. at \*20. When defense counsel allows an offer to expire without advising the  
9 defendant or allowing him to consider it, defense counsel does not render the effective assistance  
10 the Constitution requires. Id. In addition, the Court explained that its prior decision in Padilla  
11 rejected the argument that “a knowing and voluntary plea supersedes errors by defense counsel.”  
12 Id. at \*13. Because a knowing and voluntary plea does not supersede errors by defense counsel  
13 made during the plea negotiation process, see id., the Magistrate Judge erred in holding that  
14 Petitioner’s Sixth Amendment claim was barred by Tollett.

15 Petitioner’s allegations that his original defense counsel failed to communicate Petitioner’s  
16 acceptance of the six-year plea offer, if true, are sufficient to establish that his counsel’s  
17 performance was deficient, satisfying the first part of the Strickland test. See Frye, 2012 U.S.  
18 LEXIS 2321, at \*20. However, Petitioner must still satisfy the second part of the test and show  
19 that this deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687. “To show  
20 prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected  
21 because of counsel’s deficient performance, defendants must demonstrate a reasonable probability  
22 they would have accepted the earlier plea offer had they been afforded effective assistance of  
23 counsel. Defendants must also demonstrate a reasonable probability the plea would have been  
24 entered without the prosecution canceling it or the trial court refusing to accept it, if they had the  
25 authority to exercise that discretion under state law.” Frye, 2012 U.S. LEXIS 2321, at \*23-24.

26 The state appellate court noted that Petitioner had failed to establish in state court that he  
27 would have been sentenced under the six-year plea offer had his counsel communicated his  
28 willingness to accept the offer because Petitioner had abandoned any effort to enforce such an

1 agreement when he withdrew his motion for enforcement and entered into the negotiated plea.  
2 [Lodgement 8.] The Magistrate Judge correctly concluded, therefore, the state court did not have  
3 facts before it demonstrating that the Strickland prejudice standard had been satisfied, and the state  
4 court's denial of Petitioner's Sixth Amendment claim did not involve an objectively unreasonable  
5 application of the law. [Doc. No. 15 at 21.] See Frye, 2012 U.S. LEXIS 2321, at \*23-24.  
6 Accordingly, although the Magistrate Judge erred in concluding that Petitioner's claim was barred  
7 by Tollet, the Magistrate Judge still correctly concluded that the state court denial of Petitioner's  
8 claim did not involve an objective unreasonable application of Supreme Court law.

9       Petitioner also argues that the Magistrate Judge erred in finding that Petitioner's counsel  
10 was effective. [Doc. No. 22 at 1.] However, a review of the Amended R & R shows that the  
11 Magistrate Judge never made this conclusion. The Magistrate Judge only concluded that  
12 Petitioner had failed to show that the state court's adjudication of his Sixth Amendment claim  
13 involved an unreasonable application of clearly established federal law because Petitioner failed to  
14 establish that he was prejudiced by his counsel's allegedly deficient performance. [Doc. No. 15 at  
15 14-23.] As explained above, the Court agrees with this conclusion.

16       Finally, Petitioner argues that the Magistrate Judge erred in determining that habeas relief  
17 was barred by AEDPA. [Doc. No. 22 at 1.] However, because the Magistrate Judge correctly  
18 determined that the state court's denial of Petitioner's ineffective assistance of counsel claim did  
19 not involve an unreasonable application of clearly established federal law, Petitioner is not entitled  
20 to federal habeas relief under AEDPA. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S.  
21 362, 403, 412-13 (2000). Accordingly, the Court **DENIES** the Petition.

### 22 **III. Evidentiary Hearing**

23       Petitioner argues that the Magistrate Judge erred in concluding that the Court could not  
24 hold an evidentiary hearing. [Doc. No. 22 at 1-2.] The Court disagrees. The Magistrate Judge  
25 correctly concluded that Petitioner is not entitled to an evidentiary hearing in this Court to  
26 determine whether there existed an enforceable six year agreement, or whether there is a  
27 reasonably probably that the trial court would have sentenced him under that deal, because he  
28 abandoned his effort to develop the state court record when he withdrew his motion to enforce the



1 six-year plea offer and entered into the negotiated plea agreement. See Baja v. Ducharme, 187  
 2 F.3d 1075, 1078-79 (9th Cir. 1999) (holding that petitioner had failed to develop a factual basis for  
 3 his claim in state proceedings because he had the opportunity to come forward with affidavits and  
 4 other evidence in support of his ineffective assistance of counsel claim but failed to do so); see  
 5 also Williams v. Taylor, 529 U.S. 420, 435 (2000) (finding that diligence in developing the record  
 6 in state court “depends upon whether the prisoner made a reasonable attempt, in light of the  
 7 information available at the time, to investigate and pursue claims in state court.”).

8 Where a habeas petitioner has failed to develop a factual basis for his claim in the state  
 9 court proceedings and requests the opportunity to do so in an evidentiary hearing before the  
 10 district court, the petitioner must show that the claim relies on (1) “a new rule of constitutional  
 11 law, made retroactive to cases on collateral review by the Supreme Court, that was previously  
 12 unavailable” or (2) “a factual predicate that could not have been previously discovered through the  
 13 exercise of due diligence and . . . the facts underlying the claim would . . . establish by clear and  
 14 convincing evidence that but for constitutional error, no reasonable factfinder would have found  
 15 the applicant guilty of the underlying offense.” 28 U.S.C. § 2254(e)(2); see Baja, 187 F.3d at  
 16 1079. Petitioner cannot satisfy either of these provisions. Accordingly, the Magistrate Judge did  
 17 not err in concluding that the Court could not hold an evidentiary hearing, and the Court **DENIES**  
 18 Petitioner’s request for an evidentiary hearing.


### 19 CONCLUSION

20 Based on the foregoing, the Court **ADOPTS IN PART** Magistrate Judge Major’s well-  
 21 reasoned Amended Report and Recommendation, and the Court **DENIES** the Petition.

22 The Court also denies a certificate of appealability because Petitioner has not “made a  
 23 substantial showing of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(2).

24 **IT IS SO ORDERED.**

25 **DATED:** April 2, 2012

26   
 27 **IRMA E. GONZALEZ, Chief Judge**  
 28 **United States District Court**